2/13/01 **IN THE UNITED STATES DISTRICT COURT**
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOM GRECO, HARVEY'S LAKE AMPHITHEATER, INC., FACTORY CONCERTS, INC., and GRECO HOLDINGS, INC.,	:	
Plaintiffs,	:	
	:	**NO. 99-CV-2136**
v.	:	
	:	**(CHIEF JUDGE VANASKIE)**
KEITH BECCIA, JIM KOPLIK, JOHN SCHER Individually; METROPOLITAN ENTERTAINMENT CO., INC., UNIVERSAL MUSIC GROUP, OGDEN ENTERTAINMENT, and OGDEN CORPORATION, INC.,	:	
Defendants.	:	

MEMORANDUM

On December 10, 1999, defendants removed this action from the Court of Common Pleas of Luzerne County to this Court pursuant to 28 U.S.C. § 1446(b) on the basis of diversity of citizenship. Pending before this Court is Plaintiffs' Motion for Remand to State Court, wherein plaintiffs contend that removal was improper because their case became removable as the result of a state court order that effectively dismissed the non-diverse defendants over plaintiffs' objections. Because the "voluntary-involuntary" rule (precluding removal where a non-diverse defendant is dismissed at the instance of a party other than the plaintiff) survived the 1949 amendment of § 1446(b) and applies to a state court dismissal of a non-diverse defendant on jurisdictional grounds, as well as those decided on the merits, I will grant the motion to remand.

I. BACKGROUND

On February 29, 1998, plaintiffs filed a Complaint against Keith Beccia ("Beccia"), Jim Koplik ("Koplik"), John Scher ("Scher"), and Metropolitan Entertainment Co., Inc. ("Metropolitan"), in the Court of Common Pleas of Luzerne County. On March 13, 1998, the defendants removed the case to this Court on the basis of diversity of citizenship. Plaintiffs subsequently moved to file an amended complaint or, in the alternative, to voluntarily dismiss the case under Fed.R.Civ.P. 41(a)(2). The proposed Amended Complaint sought to add as defendants the Lackawanna County Commissioners, whose joinder would destroy diversity jurisdiction. Defendants opposed the motion on the ground that plaintiffs could not allege a viable claim against the County Commissioners. On August 26, 1998, this Court granted plaintiffs' motion for voluntary dismissal without prejudice.

On June 14, 1999, plaintiffs filed in Luzerne County Court a complaint, seeking relief from the defendants named in the original Complaint, as well as Universal Music Group ("Universal"), Ogden Entertainment, Ogden Corporation, and the County Commissioners of Lackawanna County, John Corcoran,[1] Ray Alberigi, and John Senio (collectively, "the County Commissioners").[2] Because the County Commissioners were citizens of Pennsylvania, diversity of citizenship was lacking, and the defendants were unable to remove the case to

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[1] The correct name of this County Commissioner is Joseph Corcoran.

[2] Universal Music Group, Ogden Entertainment, and Ogden Corporation have been dismissed from this action.

federal court.

In response to preliminary objections filed by the defendants, plaintiffs filed an Amended Complaint on July 27, 1999 and a Second Amended Complaint on September 7, 1999. On September 20, 1999, the County Commissioners filed preliminary objections to Plaintiffs' Second Amended Complaint, arguing that as to them venue in Luzerne County was improper under Pa.R.Civ.P. 2103(b). On November 29, 1999, the Honorable Ann H. Lokuta issued an Order sustaining the County Commissioners' preliminary objections to venue and allowing plaintiffs to petition the court to transfer the causes of action against the County Commissioners to the Court of Common Pleas of Lackawanna County.[3] Thereafter, by letter dated December 8, 1999, plaintiffs pointed out to Judge Lokuta that Pa.R.Civ.P. 1006(e) does not require the filing of a petition to effectuate a transfer and requested that the claims against the County Commissioners be transferred to Lackawanna County.[4] In response to this request, Judge Lokuta issued an Amended Order dated December 10, 2000, transferring the causes of actions against the County Commissioners to the Court of Common Pleas of Lackawanna County with

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[3] The Order stated that "[t]he preliminary Objections of Defendants . . . alleging improper venue, are SUSTAINED, without prejudice to Plaintiffs to petition the Court for transfer of Plaintiffs' causes of action against said Defendants to the Court of Common Pleas of Lackawanna County."

[4] Pa.R.Civ.P. 1006(e) states, in pertinent part, that "[i]f a preliminary objection to venue is sustained and there is a county of proper venue within the State the action shall not be dismissed but shall be transferred to the appropriate court of that county. The costs and fees for transfer and removal of the record shall be paid by the plaintiff."

the costs and fees for transfer and removal of the record to be paid by plaintiffs.

As a result of Judge Lokuta's Order, the only non-diverse defendants were removed from the action in Luzerne County and diversity of citizenship existed between the remaining parties. On December 10, 1999, the same day that Judge Lokuta directed that the claims against the County Commissioners be transferred and before the period for filing an appeal had expired, defendants filed a Notice of Removal in this Court.[5] (Dkt. Entry #1.) On January 10, 2000, Plaintiffs moved to remand this case to state court. (Dkt. Entry #6.)

II. DISCUSSION

A. The Voluntary-Involuntary Rule

In order for diversity of citizenship to serve as the basis for removal jurisdiction, diversity must have existed both at the time the original action was filed in the state court and at the time removal was sought. American Dredging Co. v. Atlantic Sea Con, Ltd., 637 F.Supp. 179, 181 (D.N.J. 1986). An exception to this rule is that when the non-diverse defendant is dropped from the state court action, the case may be removed even though diversity did not exist when the state court action was commenced. Id. "However, the great weight of authority holds that this exception only applies where the non-diverse defendant is dropped as the result of some

[5] It appears that the Luzerne County Court's venue decision was appealable, see Pa.R.Civ.P. 311(c), and that plaintiffs had thirty (30) days after entry of the order to file their notice of appeal. At the earliest, the appeal period would have expired on December 29, 1999, 19 days after this case was removed to this Court.

voluntary action by the plaintiff." Id. In other words, a distinction has been made between a state judge terminating the action as to a non-diverse party, which does not make the action removable, and the plaintiff voluntarily terminating the action as to the non-diverse party, which does make the action removable. Id. This distinction is derived from the "voluntary-involuntary" rule, which was developed by the Supreme Court in the nineteenth century case of Powers v. Chesapeake & Ohio Railway Co., 169 U.S. 92 (1889). This rule "requires that a suit remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable." Self v. General Motors Corp., 588 F.2d 655, 657 (9th Cir. 1978).

As explained recently in Pender v. Bell Asbestos Mines, Ltd., 46 F.Supp.2d 937, 940-41 (E.D.Mo. 1999), the voluntary-involuntary rule advances two important purposes:

> First, it contributes to judicial economy, because after an involuntary removal, the plaintiff may appeal the dismissal in state court, and success on appeal would lead to the reinstatement of the non-diverse party, destroying federal jurisdiction and compelling remand to the state court. Second, it recognizes the general principle of deference to the plaintiff's choice of forum. Allowing removal only when the plaintiff voluntarily dismisses a defendant ensures that the plaintiff will not be inappropriately forced out of state court without his consent.

(citations omitted). See also Abels v. State Farm Fire and Cas. Co., 694 F.Supp. 140, 144-45 (W.D.Pa. 1988); Jenkins v. National Union Fire Ins. Co., 650 F.Supp. 609, 611-13 (N.D.Ga. 1986).

1. The 1949 Amendment to the Removal Statute

In 1949, the removal statute, 28 U.S.C. § 1446(b), was amended to provide for the

removal of cases which were not removable on the initial pleading. Ushman v. Sterling Drug, Inc., 681 F.Supp. 1331, 1334 (C.D.Ill. 1988). Section 1446(b), in pertinent part, now provides:

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise of a copy of an amended pleading, motion, *order* or other paper from *which it may first be ascertained that the case is one which is or has become removable*.

28 U.S.C. § 1446(b) (emphasis added).

Defendants point to the words "order or other paper" in the statute and contend that since they removed the action following receipt of Judge Lokuta's order transferring the non-diverse defendants to another venue, they removed in accordance with § 1446(b). In essence, defendants argue that the words "order or other paper" eliminate the voluntary-involuntary distinction and allow removal when a non-diverse party is dismissed by an order of court.

This argument has been rejected by the overwhelming majority of courts that have addressed the significance of the 1949 amendment. See Power v. Norfolk & Western Railway Co., 778 F.Supp. 468, 469 (E.D.Mo. 1991). Indeed, every court of appeals to have considered the issue has concluded that the "voluntary-involuntary" rule survived the 1949 amendment to the removal statute. Poulos v. Naas Foods, Inc., 959 F.2d 69, 72 (7th Cir. 1992). The leading case is Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967), which examined the pertinent legislative history and found that Congress did not intend to abrogate the "voluntary-involuntary" rule. Id. at 548. In addition to the Seventh Circuit in Poulos, Weems has been

followed by the Second, Eighth, Ninth, Tenth, and Eleventh Circuits. See Quinn v. Aetna Life & Casualty Co., 616 F.2d 38, 40 n.2 (2d Cir. 1980); In re: Iowa Mfg. Co. of Cedar Rapids, 747 F.2d 462 (8th Cir. 1984) (per curiam); Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978); DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979); Insigna v. LaBella, 845 F.2d 249, 252 (11th Cir. 1988). The overwhelming majority of district courts have reached the same result. See e.g., Jenkins, 650 F.Supp. at 611 ("Section 1446(b) has been interpreted to preserve the voluntary-involuntary rule."); Ushman, 681 F.Supp at 1334 ("[T]his amendment was meant only to codify existing case law."); American Dredging Co., 637 F.Supp. at 182 (The voluntary-involuntary distinction "has survived the 1949 amendment of 28 U.S.C. § 1446."). Defendants have not cited a single case reaching the opposite result. Under these circumstances, I will follow the overwhelming precedent holding that the 1949 amendment to the removal statute did not abrogate the "voluntary-involuntary" rule.[6]

2. Dismissal of Non-Diverse Defendants Based

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[6] Evidently, the Third Circuit is not among the courts to have addressed the issue directly. In Abels v. State Farm Fire and Cas. Co., 770 F.2d 26, 33 (3d Cir. 1985), the court, in dicta, suggested that dismissal of non-diverse defendants may support removal. Id. ("[I]f State Farm is correct that no cause of action lies against its individual agents and employees under the applicable law, or should plaintiffs go to trial without having joined and served any of the [John Doe defendants], State Farm should be able to secure a dismissal of the Doe defendants and them remove.") The Third Circuit opinion, however, did not mention the well-established "voluntary-involuntary" rule. When State Farm did remove the action a second time after the Doe defendants had been dismissed, Chief Judge Cohill applied the voluntary-involuntary rule in remanding the action to state court, notwithstanding the dicta in the Third Circuit opinion. 694 F.Supp. 140, 143-44 (W.D.Pa. 1988).

Upon Jurisdictional Grounds

Defendants also contend that because the non-diverse defendants were transferred from the case based upon improper venue, the voluntary-involuntary rule does not apply. Defendants cite to Insigna v. LaBelle, 845 F.2d 249, 254 (11th Cir. 1988), and Whitcomb v. Smithson, 175 U.S. 635 (1900), to support the proposition that the voluntary-involuntary rule is inapplicable to a state court dismissal premised on jurisdictional grounds. In Insigna, the non-diverse defendant was dismissed on grounds of sovereign immunity, and the remaining diverse defendant removed the case to federal court. The district court denied the motion to remand without explanation. After an adverse judgment, the plaintiff appealed, contending that removal was improper. The defendant argued that because the dismissal of the non-diverse defendant was no longer subject to appellate court review, the finality/appealability justification for the voluntary-involuntary rule was inapplicable. While conceding this fact, the appellate court found that the plaintiff's prerogative to control the forum, absent fraudulent joinder, was a substantial independent basis for the voluntary-involuntary rule so that the finality of the state court order of dismissal was not controlling. Id. at 253-54. Notwithstanding this determination, the Eleventh Circuit held that removal was proper because "[f]or all intents and purposes a trial court's finding that it lacks jurisdiction over a resident defendant is akin to a finding of fraudulent joinder of that defendant in that it involves a determination that the resident defendant was never properly before the court, rather than a determination that the court had jurisdiction of that

defendant but that the case against him, although frivolous, was not meritorious." Id. at 254-55. In support of its conclusion that a dismissal of the non-diverse defendant on a basis other than the merits rendered the voluntary-involuntary distinction inapplicable, the court cited to the Supreme Court's decision in Whitcomb, observing:

> [T]he Court emphasized that the state court's dismissal of the remaining resident defendant "was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable . . . ."

Id. (quoting Whitcomb, 175 U.S. at 638). The court in Insigna concluded that "[w]hile the [Supreme] Court did not state what the result would have been had the dismissal been on jurisdictional grounds, the obvious implication is that, had that state court dismissed based on a finding of lack of jurisdiction . . . the voluntary-involuntary rule would not have come into play." Id.

Insinga's analysis has not been embraced by other courts. For example, in Arthur v. E.I. du Pont de Nemours & Co., 798 F.Supp. 367 (S.D.W.Va. 1992), the court commented that the jurisdictional/merits dichotomy "ignores the fact that dismissals based on jurisdictional grounds may also be successfully appealed." Id. at 369 n.2. Accord Gandy v. Crompton, 55 F.Supp.2d 593, 596 (S.D.Miss. 1999).

The court in Power reached the same conclusion when the defendant attempted to distinguish cases involving summary judgment being granted for the non-diverse defendant

from a motion to dismiss for failure to state a claim. 778 F.Supp. at 470. The court held:

> A distinction on substantive grounds is irrelevant to the inquiry regarding removal. *What is pivotal in such an inquiry is whether or not a voluntary act of the plaintiff resulted is the dismissal of the non-diverse defendant.* When diversity is created by court order, not by voluntary dismissal of the non-diverse defendant by the plaintiff, removal is improper.

Id. (citing O'Rourke v. Communique Telecommunications, Inc.,, 715 F.Supp. 828 (E.D.Mich. 1989; Ushman, supra) (emphasis added). Furthermore, numerous courts have applied the voluntary-involuntary rule to state court judgments based on jurisdictional grounds without explicitly addressing the issue. See Jenkins, 650 F.Supp 609 (finding involuntary dismissal and ordering remand after the state court dismissed the non-diverse defendants based upon improper venue); Abels v. State Farm Fire and Cas. Co., 694 F.Supp. 140 (W.D.Pa. 1988) (finding involuntary dismissal and ordering remand after the state court dismissed the non-diverse defendants based upon the expiration of the statute of limitations); Gandy, 55 F.Supp.2d 593 (finding involuntary dismissal and ordering remand after the state court dismissed the non-diverse defendants for failure to effect service of process on non-diverse defendant); Ushman, 681 F.Supp. 1331 (finding involuntary dismissal and ordering remand after the state court dismissed the non-diverse defendants for failure to comply with statutory filing requirements for stating a claim).

I agree that the rationale of Insinga cannot be reconciled with the concerns of efficiency and comity that underlie the voluntary-involuntary rule. As pointed out by plaintiffs in this case,

upon the filing of a notice of removal, "the state court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). Defendants removed this case before the appeal period had expired. Under these circumstances, plaintiffs may have been denied the opportunity to seek appellate review of the state trial court's venue ruling. In this regard, although defendants contend that the venue ruling became final upon the passage of the thirty-day appeal period, they have not addressed the significance of removal on the plaintiffs' right to appeal. Clearly, the finality justification of the voluntary-involuntary rule cannot be defeated by the very fact of removal.[7]

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[7] It should be noted that the majority of the courts that have addressed the issue have concluded that the fact that an involuntary dismissal of a non-diverse defendant has become final does not preclude remand. See, e.g., Self, 588 F.2d at 660 n.6; Jenkins, 650 F.Supp. at 612-14; Abels, 694 F.Supp. at 144-45; American Dredging Co., 637 F.Supp. at 182-83; Ushman, 681 F.Supp. at 1334-37. In Jenkins, the court observed that in three of the four United States Supreme Court cases applying the voluntary-involuntary rule, the dismissal of the non-diverse defendants had become final at the time of the Supreme Court's ruling. Accordingly, the finality/appealability rationale was not the exclusive foundation for the voluntary-involuntary rule. 650 F.Supp. at 613-15. Instead, the plaintiff's ability to control the choice of forum is at least an equally important justification for the rule. In this regard, in Great Northern Railway Co. v. Alexander, 246 U.S. 276, 282 (1918), the Court observed that the "obvious principle" of its decisions applying the voluntary-involuntary rule is that "in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case. . . ." Those cases that have suggested otherwise have not addressed the significance of this point. For example, in Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980), the court, in a footnote, simply observed that the "plaintiffs' failure to take an appeal constituted the functional equivalent of a 'voluntary' dismissal." Id. at 40 n.2. The court did not, however, indicate that it had taken into account the right of the plaintiff to choose the forum through the non-fraudulent inclusion of non-diverse defendants. In order to accommodate the right of the plaintiff to choose the forum, the finality of the state court dismissal of the non-diverse defendant cannot be regarded as a dispositive

In any event, the view of the Eleventh Circuit in Insinga -- that a dismissal of a non-diverse defendant on grounds other than the merits is akin to a finding of fraudulent joinder -- cannot be reconciled with the Third Circuit's view on what is required for a determination that a party has been joined fraudulently for the purpose of avoiding federal court jurisdiction. In Batoff v. State Farm Ins. Co., 977 F.2d 848 (3d Cir. 1992), the court reiterated that joinder is fraudulent only if "'there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment.'" Id. at 851, quoting Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991), and Abels, 770 F.2d at 32. The court also emphasized that "'where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses.'" Id., quoting Boyer, 913 F.2d at 113. This principle is irreconcilable with the Eleventh Circuit's determination that a ruling on the merits of a sovereign immunity defense is akin to a determination of fraudulent joinder. Moreover, our Court of Appeals has explicitly

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factor. Instead, the better reasoned approach adopts a bright line rule: if the dismissal of the non-diverse defendant is not the result of the plaintiff's voluntary action, remand is warranted only if the joinder was fraudulent. In this manner, decisions on whether the right to appeal has been destroyed by the removal, which may turn on state law, are obviated, and the issue of remand does not depend on the status of state court proceedings, with those plaintiffs who have secured a final ruling being deprived of a remand, but those who have not obtained a final ruling securing a remand.

rejected the approach that fraudulent joinder be based on the existence of a claim that would survive a motion to dismiss. Id. at 852. Instead, the appropriate inquiry is whether the claim against the non-diverse defendant is "wholly insubstantial and frivolous." Id. In this regard, "the removing party carries a 'heavy burden of persuasion' in making this showing." Id. at 851. The Third Circuit justified such an approach because "removal statutes 'are to be strictly construed against removal and all doubts should be resolved in favor of remand.'" Id.

Consistent with this approach, the dispositive question is not whether the state court dismissal of the non-diverse defendants was based upon the merits. Instead, the "fraudulent joinder" inquiry is limited to ascertaining whether the claims against the non-diverse defendants were "wholly insubstantial and frivolous," or not pursued in good faith. Accordingly, remand in this case is not warranted solely because the non-diverse defendants were dismissed due to improper venue.

B. Fraudulent Joinder

In footnote 3 to the brief filed by defendant Universal Music Group, Inc. in opposition to the motion to remand, it was argued that joinder of the non-diverse County Commissioners may be deemed fraudulent for the reasons that had been advanced by other defendants in opposing plaintiffs' motion to amend in Greco v. Beccia, No. 3:CV-98-0424 (M.D. Pa.). Defendants have not elaborated on this point, having failed to direct any arguments to the claims actually asserted against the County Commissioners in the state court complaint.

As noted above, when this controversy was first before this Court, plaintiffs sought to add as defendants the Commissioners of Lackawanna County. Their joinder would have destroyed diversity jurisdiction. Plaintiffs alternatively sought to dismiss the first action without prejudice so that they could proceed in state court with a new action in which they would join the Lackawanna County Commissioners as defendants. Plaintiffs' alternative request was granted, and the first action was dismissed without prejudice. In the complaint filed in state court, plaintiffs asserted claims of intentional interference with existing and prospective contractual relations against the Commissioners of Lackawanna County.

By incorporating by reference the brief filed in opposition to the motion for leave to amend the complaint in the first action, defendants are asserting here that the action against the County Commissioners was untimely as plaintiffs failed to notify the County Commissioners of their claim within six months after sustaining injury, as purportedly required by 42 Pa.C.S.A. § 5522(a). Plaintiffs responded to this contention by pointing out that the notice requirement does not bar a suit against a government unit "if the government unit had actual or constructive notice of the incident or condition giving rise to the claim of a person." 42 Pa.C.S.A. § 5522(a)(3)(iii). Plaintiffs claim that the County Commissioners had the requisite actual or constructive notice of the matter giving rise to their claims. Defendants also contended that the County Commissioners were immune from liability under the Pennsylvania Local Government Tort Claims Act, 42 Pa.C.S.A. § 8542. Plaintiffs countered this assertion by pointing out that

county officials are not immune for "willful misconduct," 42 Pa.C.S.A. § 8550, and their claims against the Lackawanna County Commissioners are based on intentional torts. Finally, defendants suggested that the Lackawanna County Commissioners could not be sued because they were parties to the contract with which they were accused of intentionally interfering. A review of the allegations of the complaint filed in state court does not reveal such a fatal inconsistency in the claims against the Lackawanna County Commissioners.

Under these circumstances, it cannot be concluded that the claims asserted against the Commissioners of Lackawanna County are wholly insubstantial and frivolous. Moreover, no evidence has been presented to suggest that plaintiffs had no intention of prosecuting their claims against the County Commissioners. Accordingly, it cannot be concluded that the joinder of the County Commissioners as defendants was fraudulent.

C. Voluntary Act of Plaintiff

Defendants contend that even if the voluntary-involuntary rule applies, removal was proper because complete diversity arose from plaintiffs' voluntary act. Specifically, defendants argue that because plaintiffs wrote a letter to the state court after the court found venue to be improper, requesting that the claims against the County Commissioners be transferred to the Court of Common Pleas of Lackawanna County, it was plaintiffs' voluntary act that made the case removable.

As previously discussed, if the plaintiff voluntarily dismisses the state action against the

non-diverse defendant, thereby creating complete diversity, the state court action may be removed. See Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988). The voluntary act demonstrates "the plaintiff's desire not to pursue the case against the non-diverse party." Id.

In the instant case, Judge Lokuta issued an Order sustaining the County Commissioners' preliminary objections to venue and allowing plaintiffs to petition the court to transfer the causes of action against the County Commissioners to the Court of Common Pleas of Lackawanna County. Plaintiffs wrote a letter pointing out that Pa.R.Civ.P. 1006(e) does not require the filing of a petition to effectuate a transfer and requesting that the claims against the County Commissioners be transferred to Lackawanna County. Thereafter, Judge Lokuta issued an Amended Order transferring those claims to Lackawanna County with the costs and fees for transfer and removal of the record to be paid by plaintiffs. By making this request, plaintiffs did not demonstrate their desire to no longer pursue the case against the County Commissioners. Moreover, this case did not become removable as the result of any voluntary act of plaintiffs. To the contrary, the case became removable as the result of an involuntary change to plaintiffs' case by the state court.

The court in Jenkins reached the same conclusion on similar facts. In Jenkins, the defendant argued that the voluntary-involuntary rule did not apply because the transfer of venue that resulted in complete diversity was a voluntary act by the plaintiff. 650 F.Supp. at

611. The court found the argument unpersuasive, stating:

> That the transfer order gave the plaintiff the "option" of paying the transfer fees does not render the transfer voluntary; failure to pay the fees would not have resulted in continued proceedings against all three defendants . . . . Instead, the plaintiff's failure to pay the transfer fees would have resulted in dismissal. . . . The transfer of venue was not due to any voluntary act of the plaintiff but was instead "the result of either the defendant's or the court's acting against the wish of the plaintiff."

Id. (quoting Weems, 380 F.2d at 546); see also Pender, 46 F.Supp.2d at 941 (failure to oppose motion to dismiss non-diverse defendant did not constitute voluntary dismissal).

Likewise, in the instant case, if plaintiffs had not effectuated the transfer of the claims against the County Commissioners, they would have been dismissed from the case. If the state court had dismissed those claims based on improper venue, it would be clear that such dismissal was not the result of any voluntary act of plaintiffs. The fact that plaintiffs avoided dismissal by requesting a transfer does not change the end result. The transfer of venue was not due to any voluntary act of plaintiffs, but was instead the result of a state court decision and the operation of a state court rule.

III. CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Remand to State Court will be granted. An appropriate Order follows.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOM GRECO, HARVEY'S LAKE AMPHITHEATER, INC., FACTORY CONCERTS, INC., and GRECO HOLDINGS, INC.,	:	
Plaintiffs,	:	
	:	**NO. 99-CV-2136**
v.	:	
	:	**(CHIEF JUDGE VANASKIE)**
KEITH BECCIA, JIM KOPLIK, JOHN SCHER Individually; METROPOLITAN ENTERTAINMENT CO., INC., UNIVERSAL MUSIC GROUP, OGDEN ENTERTAINMENT, and OGDEN CORPORATION, INC.;	:	
Defendants.	:	

ORDER

NOW, this ____ day of February, 2001, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT**:

(1) Plaintiffs' Motion for Remand to State Court (Dkt. Entry #6) is **GRANTED;**

(2) The Clerk of Court is directed to **REMAND** this matter to the Court of Common Pleas of Luzerne County; and

(3) The Clerk of Court is directed to mark this case **CLOSED**.

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Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

FILED: 2/13/01
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